

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**In the Matter of**

**NextG Networks of Illinois, Inc.,**

**Complainant,**

**v.**

**RCN Telecom Services of Illinois, LLC,**

**Respondent.**

**File No. EB-09-MD-006**

**ORDER OF DISMISSAL**

**Adopted: June 8, 2009**

**Released: June 8, 2009**

**By the Chief, Market Disputes Resolution Division, Enforcement Bureau:**

**I. INTRODUCTION**

1. On May 4, 2009, NextG Networks of Illinois, Inc. ("NextG") filed a Complaint<sup>1</sup> against RCN Telecom Services of Illinois, LLC ("RCN") pursuant to sections 224 and 251 of the Communications Act of 1934, as amended (the "Act"),<sup>2</sup> and section 1.1404 of the Commission's rules.<sup>3</sup>

2. On May 20, 2009, following a telephone conference with counsel for the parties, Commission staff issued a Notice of Complaint instructing NextG to file an amended complaint in order cure certain deficiencies in the Complaint, and setting a schedule for subsequent pleadings in this matter.<sup>4</sup>

3. On May 22, 2009, NextG's counsel informed Commission staff and counsel for RCN that NextG wished to withdraw its Complaint without prejudice in order to allow further development of facts that may lead to either resolution of the dispute or at least a narrowing of the disputed issues. On May 26, 2009, RCN's counsel informed NextG and Commission staff that RCN did not object to NextG's proposal to withdraw its pending Complaint, but noted that RCN did not waive or prejudice its right to challenge the

<sup>1</sup> Complaint for Denial of Access to Conduits, File No. EB-09-MD-006 (filed May 4, 2009) ("Complaint").

<sup>2</sup> 47 U.S.C. §§ 224, 251.

<sup>3</sup> 47 C.F.R. § 1.1404

<sup>4</sup> Notice of Complaint, File No. EB-09-MD-006 (rel. May 20, 2009).

Commission's jurisdiction over this matter.<sup>5</sup> Later that day, NextG filed a consent motion to dismiss the complaint without prejudice.<sup>6</sup>

4. We are satisfied that granting the Consent Motion will serve the public interest by encouraging parties to work privately to narrow and resolve disputed issues, which may limit or eliminate the need for litigation and the further expenditure of resources by the parties and this Commission.

5. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 224, and 251 of the Act, 47 U.S.C. §§ 154(i), 154(j), 224, 251, and sections 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 1.1401-1.1418, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the Consent Motion to Dismiss Complaint Without Prejudice IS GRANTED.

6. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 224, and 251 of the Act, 47 U.S.C. §§ 154(i), 154(j), 224, 251, and sections 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 1.1401-1.1418, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that NextG's Complaint against RCN IS DISMISSED WITHOUT PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Alexander P. Starr  
Chief, Market Disputes Resolution Division  
Enforcement Bureau

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<sup>5</sup> Attached as Exhibit A is a chain of e-mail communications, including the May 22, 2009 message from NextG's counsel, Scott Thompson, proposing to withdraw the Complaint without prejudice, and the May 26, 2009 message from RCN's counsel, Elise Dietrich, stating that RCN does not object to NextG's proposal.

<sup>6</sup> Consent Motion to Dismiss Complaint Without Prejudice, File No. EB-09-MD-006 (filed May 26, 2009) ("Consent Motion").

**Exhibit A****Lisa Saks**

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**From:** Dieterich, Elise [mailto:edieterich@sandw.com]**Sent:** Tuesday, May 26, 2009 12:11 PM**To:** Alex Starr; Thompson, Scott; Lisa Saks**Cc:** Moylan, Leslie; Paul.Eskildsen@rcn.net; Tom Steel**Subject:** RE: NextG Networks of Illinois Complaint Against RCN Telecom Services of Illinois

All -

RCN has conferred, and does not object to NextG's withdrawal of the pending Complaint as proposed below. To be clear, as Scott notes, RCN does not intend hereby to waive or otherwise prejudice its position regarding jurisdiction over this matter.

If there are questions or if a more formal expression of RCN's consent is required, please feel free to contact me. Best regards,

- Elise

**Elise Dieterich**  
**Attorney at Law**

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edieterich@sandw.com  
www.sandw.com

**BOSTON NEW YORK WASHINGTON, DC**

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**From:** Alex Starr [mailto:Alex.Starr@fcc.gov]  
**Sent:** Friday, May 22, 2009 4:58 PM  
**To:** Thompson, Scott; Lisa Saks; Dieterich, Elise; Paul.Eskildsen@rcn.net; Tom Steel  
**Cc:** Moylan, Leslie; Alex Starr  
**Subject:** RE: NextG Networks of Illinois Complaint Against RCN Telecom Services of Illinois

Counsel:

In light of NextG's desire to withdraw its complaint, we hereby waive the deadline to file an amended complaint by today. We look forward to hearing RCN's response to NextG's proposal promptly, preferably after having discussed the issue with NextG.

Alex Starr, Chief EB-MDRD

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**From:** Thompson, Scott [mailto:ScottThompson@dwt.com]  
**Sent:** Friday, May 22, 2009 2:56 PM  
**To:** Lisa Saks; Dieterich, Elise; Paul.Eskildsen@rcn.net; Tom Steel  
**Cc:** Alex Starr; Moylan, Leslie  
**Subject:** RE: NextG Networks of Illinois Complaint Against RCN Telecom Services of Illinois

All,

NextG has decided to propose the following course of action in an attempt to potentially resolve this dispute, but at a minimum, narrow the potential issues. NextG proposes to withdraw its Complaint, without prejudice, and to submit to RCN a request for access to conduit at specific locations within Chicago where NextG believes that RCN may own conduit. If necessitated by RCN's response to those specific requests, NextG would refile a new complaint. Obviously, if access is granted on lawful terms and conditions, NextG would not need to re-file.

While I believe that NextG could ultimately dismiss its complaint without prejudice unilaterally since RCN has not yet answer, please let me know if you have any objection to this proposal. I understand that RCN's position is probably that the FCC would not have jurisdiction over any subsequent complaint, and we are not suggesting that RCN would be waiving that position or that NextG would be waiving its position regarding jurisdiction by withdrawing its current complaint without prejudice now with this proposed course of action.

We would propose to file the withdrawal without prejudice on Tuesday in lieu of filing an amended complaint today. We anticipate providing RCN with the specific locations sometime next week.

Please contact me if you have any questions regarding this proposal.

Thanks

Scott

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**From:** Lisa Saks [mailto:Lisa.Saks@fcc.gov]  
**Sent:** Wednesday, May 20, 2009 1:36 PM  
**To:** Dieterich, Elise; Thompson, Scott; Moylan, Leslie; Paul.Eskildsen@rcn.net; Tom Steel  
**Cc:** Alex Starr  
**Subject:** RE: NextG Networks of Illinois Complaint Against RCN Telecom Services of Illinois

Dear Counsel:

Enclosed is a letter memorializing the rulings made during yesterday's telephone conference. A hard copy will follow by U.S. mail.

Lisa J. Saks  
Assistant Chief, Market Disputes Resolution Division  
Enforcement Bureau  
Federal Communications Commission  
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Washington, D.C. 20554  
202/418-7335 (phone)  
Lisa.Saks@fcc.gov

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